December 13, 2022

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Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
United States Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Via: https://www.regulations.gov

RE: RIN 1235-AA43; Notice of Proposed Rulemaking, Employee or Independent Contractor Classification Under the Fair Labor Standards Act

Dear Ms. DeBisschop:

The National Retail Federation (NRF) and the National Council of Chain Restaurants (NCCR) respectfully submit the following comments regarding the above-referenced proposed rule.

A. Introduction

NRF and NCCR oppose the proposed rule published by the U.S. Department of Labor (DOL) titled, "Employee or Independent Contractor Classification Under the Fair Labor Standards Act (FLSA), 87 Fed. Reg. 62218 (October 13, 2022) (hereinafter "NPRM" or the "proposed rule").

This is not the right time to adopt a new rule nor is the proposed rule the proper rule for the current and evolving economy. As the American economy and the modern workplace continue to evolve in the wake of the COVID-19 pandemic, it is imperative that policymakers account for the wide range of innovative and imaginative methods by which individuals engage in the marketplace and feed their families. This innovation, imagination and risk-taking are aspects of the American dream that should be celebrated and encouraged, not stifled.

Retailers and restaurants, like countless other businesses, maintain a wide range of business-to-business relationships with independent contractors, including billing, facility maintenance, data analysis, delivery, marketing and other critical services. Given the importance

of these relationships, NRF and NCCR would have strongly preferred for the DOL to provide clarity to the American business community and to encourage individuals to exercise the flexibility and choice to establish and manage their own businesses.

Rather, the proposed rule accomplishes little for the American economy, for business or for millions of entrepreneurial individuals. It will jettison the DOL's 2021 Rule "Independent Contractor Status Under the Fair Labor Standards Act ("the Current Rule") that clearly defines the difference between employees and independent contractors. It is improperly skewed toward a finding of employment status, even when a worker is a bona fide independent contractor engaged in a business-to-business relationship based on economic reality. It will add unnecessary confusion to businesses' operations, discourage innovation, increase costs across all industries and further drive up already rampant inflation. Finally, it will cause significant economic upheaval for both the millions of entrepreneurial individuals who currently choose to manage their own businesses through independent contractor arrangements and for the businesses across the economy that rely on these entrepreneurs for their expertise.

In sum, NRF and NCCR oppose a change in this important area of law, which is both unwarranted and unnecessary. We encourage DOL to leave in place and support the Current Rule. In the alternative, DOL should modify the proposed rule with the recommendations contained herein.

B. NRF/NCCR

NRF, the world's largest retail trade association, passionately advocates for the people, brands, policies and ideas that help retail thrive. NRF empowers the industry that powers the economy. Retail is the nation's largest private-sector employer, contributing $3.9 trillion to annual GDP and supporting one in four U.S. jobs — 52 million working Americans. For over a century, NRF has been a voice for every retailer and every retail job, educating, inspiring and communicating the powerful impact retail has on local communities and global economies.

The National Council of Chain Restaurants, a division of the National Retail Federation, is the leading organization exclusively representing chain restaurant companies. For more than 40 years, NCCR has worked to advance sound public policy that serves restaurant businesses and the millions of people they employ. NCCR members include the country's most respected quick-service and table-service chain restaurants.

C. Summary of Proposed Rule

On October 13, 2022, the DOL published an NPRM interpreting how a worker is classified under the FLSA.

In the NPRM, the DOL proposes to:

- Rescind and replace the Current Rule, which stresses that two "core" factors — an individual's control over their work, and their opportunity for profit or loss — were paramount in making an independent contractor determination;

- Adopt an "economic reality" test to determine an individual's status as an FLSA employee or an independent contractor. The test considers whether a worker is in business for himself or herself (independent contractor) or is economically dependent on a putative employer for work (employee);

- Codify a six-factor "totality-of-the-circumstances" test to guide the analysis of whether the "economic realities of the working relationship" reveal a worker to be economically dependent on the employer for work or in business for himself or herself: (1) opportunity for profit and loss depending on managerial skill; (2) investments by the worker and the employer; (3) degree of permanence of the work relationship; (4) nature and degree of control; (5) extent to which the work performed is an "integral" part of the employer's business; and (6) skill and initiative;

- Advise that the proposed totality-of-the-circumstances test would not assign special weight to any of the six factors, and instead consider them "in view of the economic reality of the whole activity" in which the worker in question is engaged; and

- Advise that additional unnamed factors may be relevant if they indicate whether individuals are in the business for themselves, as opposed to being economically dependent on the employer for work.

D. Summary of NRF/NCCR Arguments

- From a policy standpoint, the Current Rule is adequately justified, well-reasoned and rooted in Supreme Court economic reality test precedent. The Current Rule should be afforded the opportunity to be applied, rather than rescinded and replaced without first providing the opportunity for the agency and regulated community to understand and analyze the impact of those regulations;

- This is not the right time to adopt a new rule, nor is the proposed rule the proper rule for the current and evolving economy;

- The proposed rule is unnecessary and confusing, will interfere with worker choice and flexibility, and will chill innovation. Instead of providing clarity, the proposed rule creates ambiguities and is improperly skewed toward a finding of employment status, even when a person is a bona fide independent contractor based on economic reality;

- If a revised rule is adopted, the final rule should modify the proposed economic reality factors in a number of ways, including but not limited to, the following:

- *Opportunity for profit or loss depending on managerial skill* – Investment should be considered within the "opportunity for profit and loss" factor rather than as a standalone factor. Managerial skills should be broadly defined to include the ability of individuals to use their own business judgment in the performance of services.

- *Investments by the worker and employer* – The "relative investment" comparison between the worker and business should be stricken from the "investment" analysis in its entirety, as it does not shed light on the ultimate question of an individual's economic dependence. The individual's investment, including into general technology such as computers, software, vehicles or phones, should be considered as personal investments that are monetized.

- *Degree of permanence of work relationship* – "Exclusivity" should only be considered under the "nature and degree of control" factor rather than the permanence factor to prevent overlap and unnecessary confusion. Routine or automatic renewal of a contract should not be indicative of employee status, and the mere presence of an application on an individual's phone should not imply employment. There is no relationship between an individual and a company unless the application is being actively engaged to perform services, and, even then, the use of an application itself does not imply employment. The rule should recognize that each service engagement is an individual contract.

- *Nature and degree of control* – Controls that are necessary to comply with government regulations, including technology to review health/safety and compliance standards, should not be considered evidence of control for purposes of the economic realities test. Similarly, guidance on how to respond to customer requests should not be considered evidence of control. Neither should potential limits on schedules impacting business relationships (*e.g.*, hours of operation) be treated as impacting the control analysis. In contrast, control over an individual's own schedule should be recognized as a potential factor of an individual's own substantial control and, thus, independent contractor status.

- *Extent to which the work performed is an "integral" part of the employer's business* – "Integral" should not be equated with "important." Otherwise, the rule will create a *de facto* ABC test, which the DOL admittedly does not have the legal authority to do; and

- *Skill and initiative* – The "initiative" portion of this factor's analysis should be removed, as it is already considered in profit/loss analysis. The scope/definition of relevant skills should be revised to maintain the clarity provided under the Current Rule. This factor should be minimized in the overall analysis. The government should not be in the business of judging the value of skills in the analysis. The judgment of skills diminishes entrepreneurs and denies them opportunities.

Having a wide range of potential opportunities for independent contractors removes barriers to entry to entrepreneurship, economic activity and wealth creation.

- If a revised rule is adopted, it also:
    - should adopt the long-standing rule that actual practice is the critical inquiry rather than incorporate a "right to control" test into the economic realities test; and
    - should change "employer" to "potential employer" throughout to eliminate any presumption of an employer-employee relationship.

E. Analysis

1. The Proposed Rule Should be Withdrawn as it is Unnecessary, Confusing, and Will Interfere with Individual Choice

Independent contractors are a prominent piece of the American workforce and the U.S. economy — especially following the COVID-19 pandemic and the boom of innovation brought about by the gig economy. In today's constantly evolving economy, many individuals prefer entrepreneurial independent work arrangements that offer greater control over work hours and assignments and increased opportunity for profit and loss. For many individuals, these characteristics are integral elements of their full-time business model. For others, this flexibility provides important supplementary income streams. At the same time, businesses rely on the expertise and initiative of independent contractors to fulfill business needs. Indeed, retailers, along with countless other businesses, maintain a wide range of business-to-business relationships with independent contractors, including billing, facility maintenance, data analysis, delivery, marketing and other critical services.

The Current Rule embraces the realities of this evolving economy. In promulgating the Current Rule, the DOL thoroughly analyzed the chaotic state of the FLSA's application to independent contractor classification, sharpened the factors used to apply the economic reality test, and provided much needed clarity and predictability to businesses and independent entrepreneurial individuals in structuring and maintaining their relationships in the modern economy. The Current Rule provides clear and uniform guidance to businesses and independent entrepreneurial individuals that will better enable them to avoid misclassification while fostering entrepreneurial opportunities for millions of individuals and innovation in the American economy.

The Current Rule was adequately justified, well-reasoned and rooted in Supreme Court economic reality test precedent. The Current Rule has only been in effect since March 2022, and, as the DOL acknowledges in the NPRM, no court has interpreted the Current Rule's analysis. The DOL further admits that it considered waiting for a longer period of time in order to monitor

the effects of the Current Rule but decided against doing so. Therefore, the DOL is admittedly rescinding and replacing recently implemented regulations before even determining or analyzing the impact of those regulations. Rulemaking rooted in changes in administration rather than in sound policy are subject to challenge under the Administrative Procedure Act as arbitrary and capricious. Such swings in policy foster a lack of predictability that unjustifiably harm the regulated community and the broader economy.

The NPRM imposes an unweighted, "totality of the circumstances" approach to analyzing sometimes overlapping and vague factors. This approach provides little guidance as to how individuals and businesses should apply those factors when they do not all point in the same direction. While the NPRM's factors are familiar and have been cited in federal cases for decades, the NPRM changes the focus of several of these factors in a manner that creates an even more amorphous test. This would lead to greater inconsistency and less predictability in the legal treatment of relationships between individuals and companies who need clear, consistent and predictable rules and will leave the regulated community unclear as to how to properly classify a worker. Such a lack of certainty and predictability slows growth, chills innovation, reduces opportunities for individuals and interferes with worker choice.

Instead of encouraging worker flexibility and choice, the NPRM creates uncertainty and ambiguities and is improperly skewed toward a finding of employment status. If adopted as drafted, the NPRM will result in many individuals – *the vast majority of whom want to manage and grow their own businesses as independent contractors* – being treated as employees. With inflation affecting so many families and a potential recession looming over the next year, individuals and businesses need clarity, consistency and predictability, not confusion and a standard that stifles innovation.

A close reading of the proposed rule also demonstrates that WHD actually is using the rulemaking process as an improper means of pressuring entities to classify or re-classify individuals as employees not necessarily for any FLSA-related reasons but as a subterfuge to address non-FLSA legislative and regulatory policy. This is particularly evident in the Transfers section that begins at 87 Fed.Reg. 62267. In subsection 1, the WHD identifies health insurance benefits and retirement benefits as part of the safety net that normally is provided to employees, but not to independent contractors. The WHD then states: "To the extent this proposed rule would reduce misclassification, it could result in transfers to individuals in the form of employer-provided benefits or health-care benefits." Whether or not that is true, it is not an FLSA issue, but rather an issue of legislative policy. It also is a questionable assumption, as it does not take into account the myriad of insurance arrangements that are available to individuals and their families.

In subsection 2, titled "Tax Liabilities," the WHD expressly states: "Although this proposed rule only addresses whether a worker is an employee or an independent contractor under the FLSA, the Department assumes in this analysis that employers are likely to keep the status of most individuals the same across all benefits and requirements, including for tax purposes." In this subsection, the WHD discusses how reclassification could impact tax liabilities

for individuals and federal and state tax revenues and budgets. Whether an individual is an independent contractor under the Internal Revenue Code is a matter for the IRS, not for the DOL or the WHD. Similarly, whether an individual is an independent contractor or an employee under a state revenue code is a matter of state law, independent of what the FLSA may say. The WHD expressly notes that the definitions of employment may differ under various federal and state laws, and the WHD suggests that it would be improper to go outside of the definition to create a uniform standard, yet it is clearly pushing to broaden the standard for non-FLSA purposes.

It is only in subsection 3 that the WHD addresses FLSA protections, and even in this section its analysis is skewed. The WHD attempts to use statistics from the 2017 Contingent Worker Supplement (CWS) that are five years old and predate COVID-19 to make various assumptions about differences in the pay and hours worked by independent contractors and employees. Profit and loss are part of being an independent contractor, and not all independent contractors will profit equally. Similarly, independent contractors may choose to work more or fewer hours than employees. Most notably, even if an individual who is classified as an independent contractor ought to be classified as an employee for purposes of the FLSA, that would only make a difference if the individual is performing non-exempt work, if the non-exempt work results in their wages being less than the federal minimum wage, or if their non-exempt work exceeds forty hours in a workweek and they are not being paid overtime. The WHD can provide no meaningful statistics as to how many people actually are misclassified under the FLSA and who would actually be entitled to an FLSA remedy due to their misclassification.

For the aforementioned reasons, DOL should withdraw the proposed rule and leave the Current Rule in place.

2. Economic Reality Factors

As an initial matter, NRF/NCCR agrees that an "economic reality" test designed to address the ultimate question of whether, as a matter of economic reality, the person is in business for himself or herself (an independent contractor) or is economically dependent on another (an employee) is the proper basis for distinguishing independent contractors from employees under the FLSA as articulated by the U.S. Supreme Court. *See Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 33 (1961); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947); *Tony & Susan Alamo Fdtn. v. Sec. of Labor*, 471 U.S. 290, 301 (1985). However, the DOL's guidance related to the application of several of the familiar economic reality factors departs from established case law and will lead to confusion and inconsistent application of the test.

NRF/NCCR also believes that the Current Rule's framework of two core factors – the individual's control over their work and opportunity for profit or loss – as most probative of economic dependence creates appropriate, clear criteria for determining the economic realities of the relationship between individuals and businesses. As discussed below, certain of the factors

can be nebulous, overlapping and even irrelevant to the ultimate inquiry. The framework adopted by the Current Rule simplifies application of the test while adhering to Supreme Court precedent.

a. Opportunity for Profit or Loss Depending on Managerial Skill

Proposed § 795.110(b)(1) focuses the profit or loss factor on whether the worker exercises "managerial skill" that affects the individual's economic success or failure in performing the work. Proposed § 795.110(b)(1) states that the following facts, among others, can be relevant:

> [W]hether the worker determines or can meaningfully negotiate the charge or pay for the work provided; whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed; whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space.

The Current Rule similarly considers managerial skill when conducting the opportunity for profit or loss analysis. However, as set forth in more detail in Subsection b, NRF/NCCR disagrees with the DOL's proposal to consider "investment" as a separate factor in the analysis, unlike the approach in the Current Rule. NRF/NCCR believes that the analysis of the opportunity for profit or loss may be based on investment, on managerial skill, or on a combination of both, and it is best to conduct that analysis by including "investment" under the concept of "profit or loss." Indeed, investments are typically so interrelated with profits and losses that analyzing them separately is duplicative and will serve only to add unnecessary confusion to the analysis.

In addition to the confusion created by separating investment from the concept of profit or loss, proposed § 795.110(b)(1) and the DOL's guidance for applying the same are inconsistent. For example, proposed § 795.110(b)(1) states, "if a worker has no opportunity for a profit or loss, then this factor suggests that the worker is an employee." The proposed regulatory text then goes a step further, stating that "the fact that a worker has no opportunity for a loss indicates employee status." This guidance seems to transform this factor from the "opportunity for profit *or* loss" to the "opportunity for profit *and* loss." Additionally, proposed § 795.110(b)(1) states that "whether the worker accepts or declines jobs" can be relevant to demonstrating managerial skill but later states that an individual's decision to take more jobs does not reflect the exercise of managerial skill. It is unclear how the ability to "accept or decline jobs" indicates managerial skill, while the decision to "take more jobs" does not. Moreover, proposed § 795.110(b)(1) ignores the fact that the decision by an entrepreneur to grow his or her business by taking more jobs, as opposed to leveraging and expanding the business by increasing his or her financial investment, is the essence of the exercise of managerial skill. Carpenters and plumbers regularly make such decisions as they carefully balance the risk and reward of taking on more jobs using their existing resources and helpers, against the risk and reward of expanding their operation by making financial investments in more resources and hiring more helpers whom they will need to supervise. The DOL should clarify this factor.

When analyzing this factor, NRF/NCCR believes it is important to emphasize that it is the "opportunity" to earn profits or incur losses based on managerial skill, as opposed to the actual level of managerial skill shown by the individual, particularly in situations where a restaurant, retailer or other business may work with multiple independent contractors. The DOL should further emphasize that the word "opportunity" has been used intentionally and cannot be disregarded. As a practical matter, some contractors may engage in greater risk-taking or may show greater initiative than others. For purposes of predictability, it is obviously important that a business can treat all similarly situated individuals as independent contractors, as opposed to having some be viewed as employees based on their showing less initiative than others. NRF/NCCR similarly believes that it is important to emphasize that it is the "opportunity" or "ability" to earn profits or incur losses based on initiative, as opposed to the actual level of initiative shown by the individual, particularly in situations where a restaurant, retailer or other business may work with multiple independent contractors. For example, a user of an app-based platform may take certain contracting opportunities and reject others, based on that person's availability, the rate they receive for that work, the location of that work and many other factors that show the managerial skill of the individual. Because one individual seizes many opportunities while another takes advantage of few does not change their status as independent contractors.

Additionally, the fact that someone might not engage in certain practices or take on certain risks that would further impact the level of profit or loss should not result in a finding that the individual is not an independent contractor, unless that person is prevented from doing so by the entity with whom the individual contracts. For example, while some independent contractors may skillfully identify the most profitable work opportunities or best methods for limiting operating costs, others may not exercise those options as regularly or adeptly. One independent contractor might feel that marketing through social network platforms is valuable, while another independent contractor providing the same or similar services may still prefer word-of-mouth marketing or other types of referrals. These distinctions should not result in a finding that some similarly situated individuals are independent contractors and others are not. Again, the application of this concept to carpenters and plumbers underscores this point. A carpenter or plumber who chooses to market through word of mouth and to complete one job at a time, and not hire helpers and make the investments necessary to work on multiple job simultaneously, is no less an independent contractor than a carpenter or plumber who has made different choices about how to operate his or her business. This is equally true of information technology, advertising specialists, accounting professionals, and many others.

b. Investments by the Worker and the Employer

In proposed § 795.110(b)(2), the DOL is proposing to treat investment as a standalone factor in the economic reality analysis and considers whether any investments by a worker are

"capital or entrepreneurial in nature."[1] This is a departure from the Current Rule which considers investment within the "opportunity for profit and loss" factor.

NRF/NCCR strongly disagrees with the DOL adopting investment as its own separate standalone factor in the NPRM as opposed to including "investment" under the concept of "profit or loss." In today's economy, many people who are in business for themselves make investments in vehicles, tools, GPS devices, cleaning and safety supplies, and/or other equipment to provide their services. While these investments may be large or small, all can impact the contractor's ability for profit or loss. Indeed, investments are so interrelated with profits and losses that analyzing them separately is duplicative and unnecessary. The Current Rule – following Second Circuit precedent – brings clarity and helps reduce overlap to this analysis. Accordingly, NRF/NCCR believes that an individual's investment should be included under the concept of "profit or loss" and not as a standalone factor.

In addition, proposed § 795.110(b)(2) states that "the individual's investments should be considered on a relative basis with the employer's investments in its overall business." The utility of the relative-comparison factor is limited, as nearly every business will have invested more overall than any individual worker, and it would change the nature of the employment relationship based not on the individual's activities or the work done but simply on the size of the business engaging the worker. Individuals such as information technology professionals, carpenters, electricians, plumbers, accountants, painters and others would effectively be excluded from contracting with any but the smallest of companies. This comparison could act to limit opportunities for individuals to monetize their investments if they are contracting with a larger entity but not with a smaller one. This does not make sense and has nothing to do with whether the individual is economically dependent on the company with which they contract.

In the new economy, a worker can make significant contributions with very low-cost investments, such as a smartphone or even equipment and materials they already own for personal use, such as a car. In many cases, independent contractors have faced minimal barriers to entry to provide delivery, social media or other services that have helped connect retailers and restaurants to consumers. Eliminating barriers promotes entrepreneurship and diversity, as a broader range of people can start their own businesses as independent contractors. Moreover, without these independent contractors providing such services, many businesses would not have been able to survive and retain their current employees. The fact that there is less of a barrier to entry to starting and operating certain businesses in the current economy should not be a factor in determining independent contractor status. Indeed, the barriers may continue to decrease in the future.

[1] Proposed § 795.110(b)(2) is not very clear on what types of investments the DOL has in mind here, citing only those that "generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach."

The relative investment test does not shed light on the ultimate question of economic dependence. Accordingly, NRF/NCCR proposes that this relative investment test should be stricken entirely.

c. Degree of Permanence of the Work Relationship

Proposed § 795.110(b)(3) addresses the degree of permanence of the working relationship. It states:

> This factor weighs in favor of the worker being an employee when the work relationship is indefinite in duration or continuous, which is often the case in exclusive working relationships. This factor weighs in favor of the individual being an independent contractor when the work relationship is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themselves and marking their services or labor to multiple entities.

NRF/NCCR agrees that the "degree of permanence of the work relationship" can help serve as a guidepost in certain cases. However, many business relationships are by design indefinite and continuous in duration. Individuals choosing independent contractor opportunities are entering a business relationship; the relationship between an independent contractor and another business is purely that: a business-to-business relationship. That relationship does not change the nature of either organization in the relationship or the analysis of economic dependence. In particular, the fact that a relationship may be longstanding does not necessarily weigh in favor of a finding that an individual is an employee if, in fact, it was not designed to be indefinite in duration or continuous.

For example, an individual may have or may develop a long-term relationship with a restaurant, retailer or other business customer – and may devote a significant amount of time and/or resources to supporting that customer – based on choice, as opposed to any requirements or restrictions imposed by the customer. An individual may make such a choice for any number of reasons, including but not limited to profit potential, geographical convenience, a belief in the customer's social mission, or a personal relationship with the customer's owner or leadership. This cannot and should not weigh in favor of an employment relationship and instead should be viewed as evidence of an independent contractor relationship. If an individual or the DOL is going to contend that the permanence of the relationship weighs in favor of employment status, the burden should be on that individual or the DOL to provide evidence of the actual restrictions or requirements that the customer imposed that prevented the individual from being in business for themselves.

In addition, NRF/NCCR disagrees with the DOL's proposal in § 795.110(b)(3) to include exclusivity as an additional consideration under the permanency factor. Exclusivity is distinct from permanence. As the DOL acknowledges in the NPRM, exclusivity is already part of the analysis under the control factor. Analyzing exclusivity under multiple factors blurs the lines

between the economic reality factors and creates more unnecessary confusion. An exclusivity analysis should be removed from the permanence factor altogether.

Finally, the DOL's proposed regulatory text notes that where individuals provide services under a contract that is "routinely or automatically renewed," this indicates a permanent or indefinite relationship that is indicative of employee status. NRF/NCCR contends that parties should be able to renew their relationship, if mutually beneficial, without transforming the relationship into a *de facto* employment relationship. Individuals and businesses can enter into long-term and regularly renewed contracts due to superior service, competitive costs or the lack of alternative service providers, for example, and these relationships should not be considered evidence of the permanence of the relationship or employee status. Otherwise, businesses and independent contractors will be encouraged to avoid renewals of successful or beneficial relationships for fear of the relationship being viewed as continuous and thus an employment relationship. Under the DOL's proposed rule, a carpenter who enters into a long-term, renewable contract with a business, such as a law firm that owns a building requiring occasional maintenance and repair, would be transformed into an employee of the law firm. Likewise, human resources consultants, accountants, information technology professionals and others who provide services to multiple clients would suddenly be transformed from contractors to employees based on customer loyalty that results in multiple long-term arrangements. Such a result would be nonsensical and extremely harmful to entrepreneurs and businesses that rely on these services – particularly small ones that are most likely to contract with an individual. For this reason, NRF/NCCR recommends eliminating the provision noting that the routine or automatic renewal of a contract is indicative of employee status.

d. Nature and Degree of Control

NRF/NCCR believes that proposed § 795.110(b)(4)'s changes to the "nature and degree of control" analysis ignore several realities inherent to the engaging entity/independent contractor relationship. Examples in the DOL's proposed regulatory text of an individual's lack of control include the inability or limited ability to set their own schedule. However, the proposed rule also states that an individual's substantial control over their own schedule may not be indicative of independent contractor status. NRF/NCCR disagrees that control over one's schedule should be given limited or no weight in finding that a worker is not an employee. Rather, NRF/NCCR believes the Current Rule correctly recognizes that control over one's schedule may be a factor in favor of an individual's own substantial control.

Further, NRF/NCCR believes that the proposed rule overlooks certain points related to work schedules and quality control/performance standards that should be modified for purposes of clarification and business necessity. Specifically, the proposed rule modifies the control analysis by adding factors specifically excluded by the Current Rule, such as constraints imposed by customer demands and required for compliance with safety regulations. NRF/NCCR maintains that engaging entities must continue to be permitted to express their preferences as a customer, as well as pass along preferences and requests from their own customers, without fear

that doing so will turn them into an employer.[2] Further, NRF/NCCR maintains that engaging entities must continue to be permitted to ensure that work performed by independent contractors meets certain quality and safety standards common in and necessary to their industries without fear that doing so will turn them into an employer.[3] Under the DOL's proposed rule, a restaurant that specifies food delivery contractors must follow speed limits would risk making the contractors employees, even though the drivers otherwise falls outside the definition of employees. A general contractor who subcontracts with a building company to perform construction work in a law firm's office will be transformed into an employer of the building company simply by insisting and including in the subcontract that the building company perform the work to the desired specifications of the law firm customer and in compliance with local and state building standards. A coffee shop that sells baked goods would risk changing its baking vendor into an employee by requiring that the baker list possible allergens. Companies that require information technology professionals to follow specific procedures to safeguard private or proprietary information would risk making that professional an employee by doing so. These results are nonsensical.

i. Work Schedules

Proposed § 795.110(b)(4) seeks to place focus on an individual's control over their own schedule as a factor which may weigh in favor of employee status, while dismissing that same factor as an indicator of independent contractor status. In so doing, the DOL specifically notes that where the ability to pick one's own shift is "offset" by the limited hours provided by the engaging party, meaningful flexibility indicative of independent contractor status may not exist. NRF/NCCR believes that the proposed rule's stance on scheduling ignores limits on schedules that are common to many business-to-business relationships.

The DOL's focus on control over one's schedule as a favorable factor for employee status, while dismissing such freedom as a favorable factor of independent contractor status, ignores key realities of business relationships common to retailers and restaurants. For example,

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[2] Multiple courts have held that compliance with customer preferences is not an indicia of control. *See e.g., Fed-Ex Home Delivery v. NLRB*, 563 F.3d 492, 501 (D.C. Cir. 2009) ("[C]onstraints imposed by customer demands . . . do not determine the employment relationship."); *see also C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 860 (D.C. Cir. 1995) (when "a company's control over an aspect of the worker's performance is motivated by a concern for customer service, that control does not suggest an employment relationship because it is addressed to the ends to be achieved rather than the means to achieve that result"); *Penn v. Virgin Int'l Terminals*, 819 F. Supp. 514, 524 (E.D. Va. 1993) (customer's requirements as to the time of delivery do not indicate control by motor carrier); *Narayan v. EGL, Inc.*, 2007 WL 2021809, *9 (N.D. Cal. Jul. 10, 2007) (requiring drivers to comply "fully and completely" with "special requests by customers" not indicative of control"); *Wilson-McCray v. Stokes*, 2003 WL 22901569, *6 (N.D. Ill. Dec. 9, 2003) (defendant "had an interest in making sure that its customers received their goods in a timely manner, and the fact that it monitored this process to ensure prompt delivery no more creates an agency relationship than does the designation of overnight delivery on a Federal Express package").

[3] Judicial decisions demonstrate that restrictions imposed on the work performed by an independent contractor to comply with statutory or regulatory requirements are not an indicia of control by the contracting business, but rather by the regulatory agencies. *See, e.g., Ruggiero v. Am. United Life Ins. Co.*, 137 F. Supp. 3d 104, 116 (D. Mass. 2015)(citing cases).

an independent contractor might rent space within a retail store to sell goods or services. The ability for that contractor to make sales within that retail space may be limited as a result of the store's operating hours. Similarly, restaurants may enter into contracts for food delivery services. As a result of the pandemic, this now includes many restaurants where the only options previously were sit-down, drive-through and/or carryout. The delivery service hours will obviously have some limitations based on the restaurant's operating hours. A retailer or restaurant might contract for after-hours cleaning services, which would require the cleaners to perform their work within a certain time period after the store closes and before it re-opens. Although this means that there are limits as to when the cleaning services can be provided, it should not be viewed as an example of a lack of control by the service provider. It is thus unclear how, if at all, the DOL intends for its proposed rule to reconcile with the common business relationship models described above without disproportionately disfavoring any finding of independent contractor status.

ii. Quality Control/Performance Standards

As noted above, proposed § 795.110(b)(4) seeks to add control analysis factors that were specifically excluded by the Current Rule. The Current Rule provides that requirements to meet quality control standards, among other similar terms typical of contractual relationships, did not constitute control. The proposed rule marks a complete reversal of this position.

NRF/NCCR strongly disagrees with this reversal. The Current Rule's clarification on this point was important, as there is a difference between "control" and "quality control" and/or other performance standards. Like other responsible businesses, a retailer or restaurant often will require its contractors to meet certain standards with respect to the products or services the contractors provide, but this does not mean that the contractors are employees. For example, a retailer or restaurant might contract for delivery services with a requirement that delivery will be completed within a certain period of time and/or that certain safeguards be put in place to ensure that the products are not damaged, that a certain level of customer service is provided, etc. A retailer or restaurant should be able to require that services be provided in accordance with various safety standards, health standards or other legal requirements, without fear of converting independent contractors into employees.

Further, the proposed rule's reversal on this point deviates from existing case law regarding the impact of controls necessary to comply with legal obligations or health and safety standards and ignores the fact that many industry or safety specific laws explicitly require dual compliance by both a company and the independent contractor with whom it works. For example, a business may wish to require that work be performed pursuant to commonly accepted safety standards and/or in accordance with published industry standards. Such contractual language should not be considered indicative of control but rather a permissible effort to ensure the safety of both individuals and the general public.

The nature and degree of control test overlooks several issues regarding the reality of relationships between retailers and the independent contractors they work with and does not shed

light on the ultimate question of worker control. The Current Rule correctly recognizes that independent businesses routinely agree to meet deadlines and quality standards as part of their customer contracts. As such, contractually agreed-upon deadlines and quality standards should not signify employee classification. The NRF/NCCR thus proposes that this degree of control analysis be modified to remove the control factors excluded under the Current Rule.

e. Extent to which the Work Performed Is an "Integral" Part of the Employer's Business

Proposed § 795.110(b)(5) considers whether the work performed is an "integral part of the employer's business" and states:

> This factor weighs in favor of the worker being an employee when the work they perform is critical, necessary or central to the employer's principal business. This factor weighs in favor of the worker being an independent contractor when the work they perform is not critical, necessary, or central to the employer's principal business.

The NPRM equates "integral" with "important." This is significantly different from the standard promulgated by the Supreme Court in *Rutherford Food Corp. v. McComb*, which addressed whether the individual's service performed "is part of an integrated unit of production." Consistent with this ruling, the Current Rule rejects as irrelevant to this factor whether the work was important or central to the employer's business.

NRF/NCCR believes the DOL's "integral" factor in the NPRM is misguided and that this factor, as framed in the NPRM, would have little probative value to determine economic dependence. The fact that the work is important to the business does not shed light on whether the individual economically depends on that business for work.

Nor is it clear how courts should determine whether work is "important" to a company. NRF/NCCR believes that the changed test from "integration" to "importance" will lead to greater inconsistency and less predictability in the treatment of relationships between individuals and companies. Indeed, it is unclear what role a contractor could play that would not be "critical, necessary, or central to the employer's business." No rational business would spend time or money to engage an individual to perform work that is unimportant. For example, external accounting and marketing functions, both historical areas for independent contractors, would seem to be both "critical" and "necessary." The same is true with regard to plumbing, painting and carpentry services. Under the DOL's proposal, a medical office that decides its exam rooms need to be painted to conceal excessive water stains and other visible wear and tear in order reassure its patients that the physicians practicing in the office are concerned about hygiene, could be transformed into an employer of the painter, because clearly such work can be considered critical, necessary and central to the medical office's business. Without such work being done, the medical office would surely lose patients and receive negative patient reviews on the many physician review sites on the internet. Many retailers and restaurants engage

independent information technology consultants to update and maintain their computer systems. While those retailers and restaurants can clearly sell products and foodstuffs without a computer system the way it was done before the digital age, in today's world, the use of computers can surely be viewed as critical and necessary to the retailers and restaurants' business and they should not be deemed employers of their independent information technology consultants simply because they are keeping up with the times. As Judge Frank Easterbrook articulated in 1987, "*Everything* the employer does is 'integral' to its business – why else do it?" *Sec'y of Lab., U.S. Dep't of Lab. v. Lauritzen*, 835 F.2d 1529, 1541 (7th Cir. 1987) (Easterbook,J., concurring) (emphasis in original).

The Current Rule relies on and is faithful to Supreme Court precedent and the primary objectives of the FLSA classification test. If left in place, it would undoubtedly increase consistency. Assessing whether the work is "integrated" is easier and more objective than asking whether work is "important." When framed as a barometer of "importance," the factor is both vague and overbroad. NRF/NCCR thus proposes that the "integral" factor be eliminated entirely. At minimum, this factor should be assigned little weight in the analysis.

Finally, the DOL's focus on whether the function itself is "critical, necessary, or central" to the engaging entity's principal business — as opposed to whether the individuals themselves are integrated — allows factfinders to treat this as the equivalent of the second prong of an ABC test. To qualify as an independent contractor under the ABC test, the second prong requires an individual to perform work that is outside the usual course of the hiring entity's business. The DOL has already admitted that it does not have the legal authority to adopt an ABC test, but this proposed factor, as drafted, would establish a *de facto* ABC test. Such a test would radically rewrite the law and would create economic disruption.

f. Skill and Initiative

Proposed § 795.110(b)(6) seeks to treat "skill and initiative" as a standalone factor equally important to an individual's classification as their degree of control over their work and their opportunity for profit or loss. This differs from the Current Rule, which seeks to clarify the "skills required" factor by eliminating unnecessary and confusing overlap with other factors that also featured "initiative" analyses and to treat it as a helpful guidepost rather than a controlling factor.

First, NRF/NCCR disagrees with the addition of an "initiative" analysis to the skills factor. The DOL's removal of the "initiative" consideration was consistent with Supreme Court precedent and served to remove unnecessary overlap between the factors. The proposed rule, as drafted, lists initiative as a consideration under both the profit and loss and the skill factors. NRF/NCCR believes this change will serve only to add unnecessary confusion to the skills analysis and dilute the consideration of actual skill.

Further, NRF/NCCR believes the proposed rule's definition of the skill and initiative factor is vague and unclear. It will inevitably lead to confusion. The relative ranking of skills

denies entrepreneurs opportunities. Having a wide range of potential opportunities for independent contractors removes barriers to entry to entrepreneurship, economic activity and wealth creation. The proposed rule appears to focus on skills in running an independent business rather than whether a worker is highly skilled in the substance of a particular field. However, the proposed rule goes on to cite decisions in which courts found positions such as janitors and security guards did not require specialized skills to perform their work. Accordingly, it is unclear whether the DOL's proposed analysis seeks to focus on the type of skills required to perform the work itself or on the skills required to run a business.

In the interest of clarity, the DOL should focus its proposal away from the specialization needed to run an independent business or perform a particular task and instead on whether the potential employer provides the necessary skills or whether the individual cultivates and develops those skills through their own entrepreneurial efforts. Doing so would still align with the proposed rule's goal of separating the economically dependent from those who are economically independent. The DOL also should eliminate the word "specialized," as that term obviously can be subject to many different interpretations. For example, a retailer might employ drivers for certain types of services but might also need contractors to perform the same or similar services. In this type of a situation, there may be a specialized skillset (for example, a CDL) required, but in other instances, it might instead only require a personal driver's license. The fact that many people have regular driver's licenses should not be viewed as in any way negating or reducing the likelihood that a contractor who meets the other factors will be properly treated as an independent contractor. Nor should the relative lack of complexity of the task be considered indicative of skill in running a business. Again, the government's ranking of skills denies entrepreneurs opportunities. Having a wide range of potential opportunities for independent contractors removes barriers to entry to entrepreneurship, economic activity and wealth creation.

NRF/NCCR recommends that this factor be modified to remove the "initiative" portion of the analysis, which is already part of the profit or loss analysis, and that the scope of relevant skills be revised in the interest of maintaining the clarity provided by the Current Rule. In revising the scope of this factor, NRF/NCCR also recommends that the wording be changed to "the skill, talent or creativity" associated with the work. For example, a restaurant might enter into agreements with singers or other entertainers to perform at their restaurants. Although there may be several people who are good singers who already work at the restaurant, that does not transform the singers performing in the restaurant into employees. Similarly, an individual who contracts with a restaurant to make balloon animals or contracts with a retailer to dress as Santa Claus for customers might not have any extensive training but still should be treated as an independent contractor. These opportunities provide entrepreneurial paths for people of all walks of life. NRF/NCCR further recommends that this factor be minimized in the analysis or, at the very least, clarify that this factor may be relevant in some but not all instances.

3. Additional Comments

The NPRM departs from the Current Rule's adoption of the long-standing rule that actual practice is the critical inquiry in the economic realities test. The NPRM notes that courts must also consider "theoretical rights to control," which may be equally as important. The NPRM cites as an example a contractual provision allowing the company to make supervisory visits, even if the right is rarely exercised. This effectively incorporates a "right to control" test into the economic realities test. NRF/NCCR strongly disagrees with this analysis, and it should be removed from the NPRM. NRF/NCCR believes that terminology that might be similar to that used in an employment agreement should not necessarily be viewed as weighing in favor of an employment relationship. For example, a business might state in an agreement that it has the ability to supervise the work, but if it never does so, that should not have an impact on finding that the control factor weighs in favor of an independent contractor determination.

Finally, the NPRM uses the term "employer" throughout. This wording creates a presumption of an employer-employee relationship. The Current Rule addresses this issue by using throughout the rule the phrase "potential employer," which meant "putative employer" or "alleged employer." NRF/NCCR proposes that the same approach be used here.

F. Conclusion

For the reasons articulated in full above, NRF/NCCR opposes the DOL's proposed rule and encourages the DOL to leave in place and support the Current Rule, which is sound public policy, increases legal certainty in application of the economic realities test, and is grounded in and consistent with Supreme Court precedent. In the alternative, the DOL should modify the proposed rule with the recommendations contained herein.

NRF/NCCR appreciates the opportunity to submit these comments.[4]

Sincerely,

David French
Senior Vice President
Government Relations

[4] The law firm of Ogletree Deakins assisted NRF in drafting these comments.